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Practitioner Insights: Prioritizing Health Was Intent of New Chemicals Reforms

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By Senator Tom Udall

One year ago, Congress did what many thought was impossible: it passed and the president signed into law the most sweeping environmental reform legislation in 25 years and the first significant update of the Toxic Substances Control Act in 40 years. The Frank R. Lautenberg Chemical Safety for the 21st Century Act was written first and foremost to protect public health and safety by ensuring that the Environmental Protection Agency had the resources and the explicit direction to determine the safe use of all chemicals on the market, and to evaluate all new chemicals before they go to market.

Today, the new law is at a critical juncture. The EPA's first challenge was to implement enhanced requirements for the new chemicals program, which took effect immediately. That has meant a change in business as usual as the agency and industry groups grapple with reforms to the way new chemicals are reviewed and move to market.

It is understandable that this has caused growing pains for both the EPA and industry. But I want to address head on the claims by some that the EPA has misunderstood Congress' intent and that its actions have caused unintentional challenges in the implementation of the new chemicals program. This claim is false. House and Senate negotiators debated this section at length, and the reforms to the new chemicals program need to be acknowledged for what they are—serious changes written expressly to better ensure the safety of new chemicals that are moving to market and the health of those who come in contact with them.

Prior to our reforms, several of my colleagues and I had almost no confidence that the EPA was giving new chemicals a robust and serious review. New chemicals went to market within 90 days regardless of whether there was adequate information or a safety determination by the EPA. While I have great admiration for the staff at the EPA and their work, I felt very strongly that this process—which prioritized speed of review—did not do enough to protect public health and safety. I did not write the section to safeguard the speed with which new chemicals would get to market. My goal was to ensure that the public could have confidence that the chemicals going to market are safe. As such, we added a great deal to raise the bar on the finding that the EPA needs to make for a new chemical to get onto the market.

I can appreciate that there are many in industry who balk at this change. But 90 days is not always enough time to ensure that sufficient information is available and to negotiate the conditions to mitigate potential risk. If industry needs to expedite the process, it should provide the health and safety information up front that will allow the EPA to make timely decisions.

Critically, Congress also required that the EPA evaluate new chemicals under their conditions of use, which the law defines to include those that are "reasonably foreseen" as well as intended. It is essential for the EPA to be required to examine such potential uses, as once a new chemical enters the market, companies can use it in ways other than those initially intended. Indeed, absent EPA action, once a chemical is on the market, any other company can use it in new ways not anticipated by the company that first made it.

Hence the law requires that EPA's review and determination on a new chemical notice expressly consider reasonably foreseen uses. Where concerns are identified or insufficient information has been provided by a company, the EPA must issue an order imposing conditions sufficient to ensure that the chemical can be expected to be safe if used in reasonably foreseen ways, even if those extend beyond those the company intends. It is not sufficient under the new law for the EPA merely to require notification of companies seeking to engage in reasonably foreseen uses, as was sometimes done under the old law.

These new requirements are significant: the EPA now has to be prepared to stand by its decision of safety, and pre-manufacture information must be robustly reviewed and analyzed and extend to uses beyond those identified by a company that can be reasonably foreseen. As a result, the EPA has had to add many new staff into the new chemicals program to address the flow and conduct the requisite enhanced review, including for the many chemicals that were pending when the reforms were passed into law. While the EPA bears a great deal of the burden of reviewing and processing these submissions, if we are to see an efficient process that is beneficial to their desired timeline, industry must listen carefully to what the EPA needs and adjust accordingly by providing more information in its initial submissions. The EPA has already acknowledged the need to provide additional guidance on the types of information, testing, and forms that should accompany pre-manufacture notices for new chemicals.

Passing TSCA reform was not easy, especially with a divided government. Implementing and adhering to the new reforms will not be easy either, but it is essential that we adhere to the balance we struck. Industry and its allies must avoid the temptation to pick up gains that were not part of the deal because of a new favorable political climate, whether in the new chemicals program or in other areas of the new law. TSCA reform was grounded in a delicate balance and we need to keep it that way.

Tom Udall is the senior senator from the state of New Mexico